No. SC85582

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IN THE

SUPREME COURT OF MISSOURI

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STATE OF MISSOURI,

Appellant,

v.

LESLIE A. BROWN,

Respondent.

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Appeal from the Circuit Court of Greene County, Missouri

Division V

The Honorable Calvin R. Holden, Judge

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# RESPONDENT'S BRIEF


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## Jurisdictional Statement

This Court does not have jurisdiction to hear the interlocutory appeal in this cause of action because an appeal by the state of the trial court's finding that §§ 210.115 and 210.120 RSMo are unconstitutionally vague is not authorized by § 547.200 R.S.Mo, the statute relied upon by the state to seek review. However, even if the subject matter of the trial court's ruling is reviewable, the state's notice of appeal was not timely filed.

Section 547.200 RSMo authorizes the state to take an interlocutory appeal when the substantive effect of any order or judgment is to (1) quash an arrest warrant; (2) determine that the accused lab cks the mental capacity or fitness to proceed to trial; (3) suppress evidence; or (4) suppress a confession or admission. The trial court's declaration that §§ 210.115 and 210.120 are unconstitutionally vague does not place the issue in this appeal within any of the above categories. As a result the state is without a remedy in this Court.

In the alternative, an interlocutory appeal by the state under § 547.200 requires that a notice of appeal be filed "within five days of the entry of the order of the trial court."

The trial court's order dismissing the state's misdemeanor information was filed on September 9, 2003. (L.F., p.24). The state's notice of interlocutory appeal was filed on September 15, 2003, six days after entry of the order. (L.F., p. 28).

Since the validity of § 547.200 RSMo is not in issue, its terms should be narrowly construed. *State v. Condict,* 65 S.W.3d 6, (Mo.App.2001); *State v. Chadeayne,* 323 S.W.2d 680 (Mo.1980); *State v. Taylor,* 133 S.W.2d 336 (Mo.1939); *State ex inf. Collins v. St. Louis & S.F.R. Co.,* 142 S.W. 279 (Mo.1911). Given the state's notice of appeal is outside the range of timing permitted by the statute, its interlocutory appeal should be dismissed.

## Statement of Facts

On February 13, 2003, emergency room nurse Leslie Brown was charged by misdemeanor information in the Circuit Court of Greene County, Missouri, with failing to report to the Missouri Division of Family Services on August 10, 2002, that "reasonable cause existed to believe that Dominic James had been or may be subjected to abuse." (Legal File [hereafter L.F.], p. 1). Count II of the information charged that Leslie Brown also failed to report to her supervising the physician that reasonable cause existed to believe that Dominic James had been abused and that photographs of the child's injury should have been taken. (L.F., p. 1).

On April 11, 2003, defendant's second motion to dismiss on constitutional grounds was filed and an evidentiary hearing held on the same date in front of the Honorable Calvin R. Holden, circuit judge. (L.F., p. 19; Hearing Transcript [hereafter H.T.], p. 1). Sections 210.115.1 and 210.120 RSMo were challenged on vagueness grounds arising out of the Due Process clauses contained in the Fifth and Fourteenth Amendments. (L.F., p. 19-23). The texts of the statutes are as follows:

> *210.115.1. When any physician, medical examiner, coroner, dentist, chiropractor, optometrist, podiatrist, resident, intern, nurse, hospital or clinic personnel that are engaged in the examination, care, treatment or research of persons, and any other health practitioner, psychologist, mental*

*health professional, social worker, day care center worker or other child-care worker, juvenile officer, probation or parole officer, jail or detention center personnel, teacher, principal or other school official, minister as provided by section 352.400, RSMo, peace officer or law enforcement official, or other person with responsibility for the care of children has reasonable cause to suspect that a child has been or may be subjected to abuse or neglect or observes a child being subjected to conditions or circumstances which would reasonably result in abuse or neglect, that person shall immediately report or cause a report to be made to the division in accordance with the provisions of sections 210.109 to 210.183. As used in this section, the term "abuse" is not limited to abuse inflicted by a person responsible for the child's care, custody and control as specified in section 210.110, but shall also include abuse inflicted by any other person. 210.120 RSMo. Whenever a person is required to report under sections 210.110 to 210.165 in his official capacity as a staff member of a medical institution, whether public or private, he shall immediately notify the physician in charge or his designee who shall then take or cause to be taken color photographs of physical trauma and shall, if medically indicated, cause to be performed radiologic examination of the child who is the subject of a report, costs of which shall be paid by the division.*

*Reproductions of such color photographs and/or radiologic reports shall be sent to the division as soon as possible.*

*210.165.1 Any person violating any provision of sections 210.110 to 210.165 is guilty of a class A misdemeanor.*

Dr. Bernard Kennetz, has been an emergency room physician since 1994 and involved in the diagnosis and treatment of thousands, if not tens of thousands, of patients in emergency rooms during the course of his career. (H.T., p. 79-80). Many of his patients have been children. (H.T., p. 80). At the time of his testimony he was employed by Cox Medical Center. (H.T., p. 91)

In his work, Dr. Kennetz has seen many children with bruises and actually believes it would be abnormal for a child under the age of five to be without bruising. (H.T., p. 80). Having to report to child welfare authorities every bruise observed in a child would, in Dr. Kennetz's opinion, materially affect the physician-patient relationship and his ability to render care. (H.T., p. 84-85). Introducing the additional concern of child abuse allegations from injuries of unknown origin to parents already stressed because of a suffering child would not be therapeutic. (H.T., p. 84-85). He also holds the opinion that judgments among those evaluating child abuse have to be considered within the context of each person's role and that frequently there are differences in judgments based upon variables that may or may not be known by others in the chain of evaluation. (H.T.

84-85). Even physicians who have equal access to information often reach different conclusions about the causes of injuries. (H.T., p. 86).

Over the past ten years, Dr. Kennetz has reported to child abuse authorities ten to fifteen cases of bruising when it was accompanied by other injuries such as fractures or lacerations. (H.T., p. 87-88). Only a fraction of a per cent of bruises he observed was reported as the sole indicator of abuse. (H.T., p. 89). Similarly, Dr. Kennetz disputed as "too high" the state's assertion that 30 per cent of children seeking treatment in emergency rooms are victims of abuse. (H.T., p. 89-90). He also knew of no other physician who had experienced such high rates of child abuse in emergency room care. (H.T., p. 90).

Before her retirement, Barbara Schaffitzel was director of nursing for Cox Medical. (H.T., p. 93-94). In that capacity, she was accountable for the supervision of approximately 1,000 nurses over a period of twenty years. (H.T., p. 94-95). As part of her duties, she, along with others, was responsible for establishing and implementing the policy for reporting child abuse at Cox Medical Center. (H.T., p. 95).

She acknowledged that many times there was disagreement among the nursing staff as well as others as to the meaning of the term "reason to suspect." (H.T., p. 96-97). Often, the determination of child abuse depended on a variety of circumstances including the consistency of an explanation of injury. (H.T., p. 100).

An explanation for bruising offered by a foster parent would generally be given more credence than that offered by others. (H.T., p. 101). The extent of the inquiry also might be affected by the seriousness of other injuries, the consistency of several witnesses or by other factors such as the time available for questioning. (H.T., p. 99-102). Minor aspects of a child's injuries such as "fingertip bruises" might be overlooked if there were a focus on other medical concerns. (H.T., p. 104). The unique circumstances surrounding each examination also could play a role in a nurse's assessment and is hard to duplicate from case to case. (H.T., p. 104-106). The amount of time spent with a child or confirmation or lack thereof of injuries through other diagnostic methods also might play an important role in making a judgment about "reasonable cause to suspect" child abuse. (H.T., p. 104-106).

At the hearing on the motion to dismiss, former Missouri state senator Emory Melton recalled that he was a member of the Missouri Senate when § 210.115 RSMo was adopted and that under the statute it would be virtually impossible for a defendant to really know what choice he or she faced. (H.T., p. 40-41).[1] According to Melton - who voted for the legislation but questioned the

[1] At the time of the hearing of defendant's motion, Emory Melton had been a practicing attorney in the southwest Missouri for more that 56 years. (H.T., pg. 39).

language of the statute - it ". . . boils down to the phrase, 'reasonable cause to suspect that a child has been or may be subjected to abuse,' . . . .There has to be some standard to which the defendant must hold himself or herself in order to have a successful criminal charge." (H.T., p. 41-42).

Dr. Alice Bartee, a professor of political science at Southwest Missouri State University and an expert on constitutional law, also concluded that sections 210.115 and 210.120 RSMo were void for vagueness.[2] (H.T., p. 63-64). Citing Justice Brennan in *Zwickler v. Koota*, 389 U.S. 241 [citation added], Dr. Bartee declared that a statute is void for vagueness if reasonable men have to guess at the meaning and can reach different conclusions. (H.T., p. 66). In response to the question: Does this law convey definite warnings as to the conduct that common men and women might understand to be prohibited or is it vague? Dr. Bartee replied "It is vague."(H.T., p. 67).

## Argument

The trial court correctly ruled that §§ 210.115 and 210.120 are void for vagueness under the Fifth and Fourteenth Amendments to the United States Constitution and Article I, Section 10 of the Missouri Constitution because the term "reasonable cause to suspect" in the context of these statutes does not provide

[2] Dr. Bartee hold a doctorate in public law and government from Columbia University. (H.T., p. 63).

fair warning of prohibited conduct and, more importantly, impermissibly fails to establish standards for the police and public that sufficiently guard against the arbitrary deprivation of liberty interests. Viewed another way, if those subject to the statutes are stripped of the ability to exercise discretion - either by an interpretation that prohibits it or general confusion - then the purpose of the statutes, to act as effective tools in the fight against child abuse, would be lost. All mandated reporters of child abuse would be required to report every instance where injury to a child conceivably could have had its genesis in warranted or unwarranted violence, thus overwhelming the ability of anyone to exercise discretion.

*I. The Void for Vagueness Doctrine.*

In Missouri, it is a basic principle of due process that legislative enactments are void for vagueness if their prohibitions are not clearly defined. *Cocktail Fortune, Inc. v. Supervisor of Liquor Control*, 994 S.W.2d 955, 957 (Mo. 1999). The doctrine ensures that laws give fair notice of proscribed conduct and protect against arbitrary and discriminatory enforcement. *Id.* A law meets the test if it "speaks with sufficient specificity and provides sufficient standards to prevent arbitrary and discriminatory enforcement." *Psychiatric Healthcare Corporation of Missouri v. Department of Social Services,* 100 S.W.3d 891, 903 (Mo.App. 2003). The test employed in enforcing the doctrine is whether the language conveys to a

person of ordinary intelligence a sufficiently definite warning as to the proscribed conduct and does not leave enforcement to arbitrary judgments by law enforcement officials. *Cocktail Fortune, Inc. v. Supervisor of Liquor control,* 994 S.W.2d at 957.

Underlying the general principle is the long-held idea that the Constitution was designed to maximize individual freedoms within the framework of ordered liberty. *Kolender v. Lawson,* 491 U.S. 352, 357, 103 S.Ct. 1855, 1858, 75 L.Ed.2d 903 (1983). In furtherance of the principle, statutory limitations on those freedoms are examined for definiteness and certainty of expression. *Id.*

In *Kolender,* the Supreme Court also observed:

> Although the doctrine focuses both on actual notice to citizens and arbitrary enforcement, we have recognized recently that the more important aspect of vagueness doctrine 'is not actual notice, but the other principal element of the doctrine -- the requirement that a legislature establish minimal guidelines to govern law enforcement.' *Smith, supra,* 415 U.S. at 574, 94 S.Ct., at 1247-1248. Where the legislature fails to provide such minimal guidelines, a criminal statute may permit 'a standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections.' *Id.*, at 575, 94 S.Ct. at 1248.

Id at 359.

As far back as 1875, the Supreme Court has reminded us:

> It would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large. This would, to some extent, substitute the judicial for the legislative department of government. *United States v. Reese,* 92 U.S. 214, 221, 23 L.Ed. 563 (1875).

If arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards that do not entrap the innocent by failing to provide fair warning. *Grayned v. City of Rockford,* 408 U.S. 104, 108-109, 92 S.Ct. 2294, 2298, 33 L.Ed.2d 222 (1972). Similarly, a statute is defectively vague if it delegates basic policy matters to policemen, judges and juries for resolution on ". . . . an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application." *Id.*

Finally, if the public is uncertain as to the conduct a statute prohibits, it is vague and standardless and violates the Due Process clause. *Chicago v. Morales,* 527 U.S. 41, 56, 119 S.Ct. 1849, 1859, 144 L.Ed.2d 67 (1999). "No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes." *Lanzetta v. New Jersey,* 306 U.S. 451, 453, 59 S.Ct. 618, 83 L.Ed.2d 888 (1939).

*II. The Elements of Statutory Construction.*

First, the prevailing party may assert in a reviewing court any ground for support regardless of whether or not the lower court considered the argument. *Dandridge v. Williams,* 397 U.S. 471, 476 fn.6, 83 S.Ct. 1804, 10 L.Ed.2d 100 (1970).

Second, in evaluating statutes for vagueness claims, criminal statutes are subject to greater scrutiny because the consequences of imprecision are qualitatively more severe. *Cocktail Fortune, Inc. v. Supervisor of Liquor Control,* 994 S.W.2d at 957-958; *Kolender v. Lawson,* 461 U.S. at 358, fn.8; *Village of Hoffman Estates v. Flipside,* 455 U.S. 489, 498-499, 102 S.Ct. 1186, 71 L.Ed.2d 362 (1982).

Third, statutes are presumed to be constitutional and must be construed as consistent with the Constitution. *State v. Young,* 695 S.W.2d 882, 883 (Mo. 1985). However, it is also true that appellate courts construe ambiguities in criminal statutes against the state and in favor of defendants. Even though courts are not obliged to abandon common sense or ignore an evident statutory purpose, they cannot indulge in statutory revision in the face of genuine uncertainty. *Id.* at 886; *State v. Condict,* 65 S.W.3d 6, 17 (Mo.App. 2001).

Fourth, the absence of a mens rea or scienter requirement warrants greater examination of criminal statutes when reviewed for vagueness and subjects

questioned statutes to facial attack. *State v. Condict,* 65 S.W.3d at 17; *State v. Young,* 695 S.W.2d at 886; *Hoffman Estates v. Flipside,* 455 U.S. at 499; . *Chicago v. Morales,* 527 U.S. at 55.

Lastly, reviewing courts are permitted to take statutes involving similar or related subjects when those statutes shed light on the statute being construed. *State v. Knapp,* 843 S.W.2d 345, 347 (Mo. 1992).

In summary, this Court may utilize any legal rationale it wishes to sustain the trial court's ruling, even though it was not discussed or considered by the court below. In the context of vagueness claims, statutory construction should be viewed as an aid in avoiding constitutionally arbitrary and confusing directives in criminal statutes. However, important factors unique to criminal statutes such as the presence or lack of mens rea requirements and ambiguous language also affect statutory legitimacy under the Constitution and should be carefully considered.

*III. The Vagueness of 210.115.1.*

At the heart of the state's appeal is the sentiment that the protection of children is a compelling interest and that, whatever the deficiencies of Missouri's child abuse reporting statute, they should be overlooked in favor of the need to detect and diminish child abuse. Respondent Brown concedes that child abuse is

a serious apprehension but disagrees that Due Process and vagueness complaints should be forgotten when analyzing the content of 210.115.1 RSMo. [3]

As to the sufficiency of the statute, the state offers an extensive list of statutory tests including queries about common understanding, the dictionary test, looking to other jurisdictions, and the reasonable man standard (including variations such as "reason to believe", "reason to suspect" and "should know or have knowledge of"). On the other hand, the state gives no explanation of why §215.015.1 acting in concert with 210.120 and 210.165 RSMo is not void but, instead, leaves it to the Court to apply the various tests.

Consideration of portions of the language of the § 210.115.1 holds the key to deciding the constitutionality of our statutory scheme governing the mandatory reporting of child abuse. More specifically, the meaning of the phrase "reasonable cause to suspect that a child has been or may be subjected to abuse or neglect or observes a child being subjected to conditions or circumstances which would reasonably result in abuse or neglect" is central to the trial court's conclusion of unconstitutionality on vagueness grounds. Starting with

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[3] *Kolender v. Lawson*, 461 U.S. at 361, the Supreme Court observed that our concern with crime requires the attention of all branches of government but, no matter how weighty, it does not diminish the constitutional need for definiteness and clarity.

"reasonable cause to suspect that a child has been or may be subjected to abuse or neglect", a "reasonable" analysis of the wording yields little understanding.

For example, any injury, but chiefly bruising as is the allegation here, almost certainly would always lead to the supposition that it was caused by abuse or neglect. There is hardly a child alive, especially those under five, that is injury free and thus free of suspicion of abuse. Does the presence of a scintilla of evidence of injury mandate a call to the child abuse hotline? Or, should the mandated reporter's decision to call be based upon a preponderance of the evidence with which he or she is confronted? Without guidance in the statute, it is difficult if not impossible to determine what level of evidence requires action. Inspected from another point of view, do well-defined terms like "reasonable suspicion" or "probable cause" play any role in defining the statutory scheme employed to report child abuse? Unfortunately, no Missouri case has ever been decided that would aid in resolving the question. Equally regrettable, most of the cases cited by the state do not permit analogies to Missouri law because they contain additional language not found in our statutes, such as scienter requirements.

The state cited a Wisconsin case, *State v. Hurd*, 400 N.W.2d 42 (Wis.App. 1986) to define "reasonable cause to suspect" as meaning ". . . a readily ascertainable and understandable standard that involves a belief, based on

evidence but short of proof, that an ordinary person would reach as to the existence of child abuse." *Hurd* at 46. The state, however, did not reveal that the Wisconsin statute also required a showing of willfulness, which it defined as an intentional act. *Id.* at 47. To obtain a conviction in Wisconsin, the state must prove beyond a reasonable doubt that a defendant not only failed to report suspected child abuse but did so willfully. *Id.* at 46. Also, a conviction could not be achieved under the Wisconsin statute if the offending act was the product of "mistake, neglect or misadventure." *Id.* at 47. The addition of willful conduct attaches a scienter requirement to the mix and makes Wisconsin's law more constitutionally palatable. Absent this feature, as in Missouri's law, the reporting statute remains suspiciously vulnerable to vagueness. *State v. Condict,* 65 S.W.3d at 17; *State v. Young,* 695 S.W.2d at 886; *Hoffman Estates v. Flipside,* 455 U.S. at 499; . *Chicago v. Morales,* 527 U.S. at 55.

In another case cited by the state, *People v. Cavaiani,* 432 N.W.2d 409 (Mich.App. 1988), the court observed that the words "reasonable cause to suspect" speak for themselves and provide fair warning. *Cavaiani* at 413. From there, however, the court reached the breathtaking conclusion that under the Michigan child abuse statute, reporters had no discretion and that it was up to the Department of Social Services to determine if there was a basis for the complaint. *Id.* The format adopted there abandons altogether the exercise of discretion by

reporters. Perhaps this adventuresome approach is permitted because Michigan requires the failure to report to be done "knowingly" before criminal liability will ensue. *Id.* at 411. Like *Hurd*, the addition of a mens rea requirement gives Michigan's law greater protection and inoculation from vagueness attacks. See *State v. Condict,* 65 S.W.3d at 17; *State v. Young*, 695 S.W.2d at 886.

*Morris v. State*, also cited by appellant, is of no interest in that it requires *knowing* conduct before criminal liability sets in and contains almost no discussion of its rationale for finding that "cause to believe" passed muster. *Morris v. State,* 833 S.W.2d 624, 627 (Tex.App. 1992).

The Minnesota case, *State v. Grover,* is referred to by the state for constitutional approval of the language "reason to believe." *State v. Grover,* 437 N.W.2d 60 (Minn. 1989). The Minnesota child abuse reporting statute under consideration in that case did not contain a mens rea requirement but in its nonattendance the court adopted a standard of criminal negligence - different from civil negligence - which it defined as involving a gross deviation from the standard of care that a reasonable person would observe in the actor's situation.[4] *Id.* at 63.

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[4] Although Missouri's child abuse reporting statutes make no reference to the gross deviation standard it is instructive to look at Missouri statute 562.016 RSMo. § 526.016 declares ". . . .a person is not guilty of an offense unless he acts with a

Of course, Missouri's statute contains neither a scienter requirement nor a definition of criminal or civil negligence. The effect is a state of confusion.

On balance, the collection of cases offered by the state is distinguishable from the situation in Missouri, in that all except the Minnesota statute contain scienter requirements which, even under Missouri law[5], would arm the statutes against constitutional attack. Conversely in Minnesota's *State v. Grover,* the Minnesota Supreme Court declared that in the absence of a mens rea requirement, conviction would require a gross deviation from the standard of care. *State v. Grover,* 437 N.W.2d at 63. In Missouri, the child abuse reporting law makes no

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culpable mental state, that is, unless he acts purposely or knowingly or recklessly or with criminal negligence, as the statute defining the offense may require. . ." It goes on to state that "a person acts with 'criminal negligence' or is criminally negligent when he fails to be aware of a substantial and unjustifiable risk that circumstance exist or a result will follow, and such failure constitutes a *gross deviation from the standard of care which a reasonable person would exercise in the situation*. This standard, though seemingly draped in common sense, is contrary to the state's position of arbitrary enforcement as well as the language of §§ 210.110 to 210.165 RSMo.

[5] See *State v. Condict,* 65 S.W.3d at 17; *State v. Young,* 695 S.W.2d at 886.

mention of gross deviation and as a consequence leaves it without a standard of conduct.[6] The child care professional may earnestly believe that no abuse occurred but, nevertheless, is compelled by the law to unleash the state's inquisitors upon the child and his parents because there is no guidance to do otherwise.

Since it is possible to find a criminal statute constitutional without the constraint of specific intent, given the wide berth of interpretation found in case law, it behooves us to look at the practical implications of Missouri's child abuse reporting law. The testimony of Dr. Bernard Kennetz and Barbara Schaffitzel put some flesh on the argument that the present law poses real dilemmas for health care professionals.

In his work as an emergency room physician at Cox Medical Center in Springfield, Dr. Kennetz has seen many children with bruises and believes it would be abnormal for a child under the age of five to be without bruising. (H.T., p. 80, 91). Having to report to child welfare authorities every bruise observed in a child would, in Dr. Kennetz's opinion, materially affect the physician-patient relationship and his ability to render care. (H.T., p. 84-85). Introducing the additional concern of child abuse allegations from injuries of unknown origin to parents already stressed by the suffering of a child would not be therapeutic. (H.T.,

[6] See *State v. Young,* 695 S.W.2d at 886.

p. 84-85). He also holds the opinion that judgments among those evaluating child abuse have to be considered within the context of each person's role and that frequently there are differences in judgments based upon variables that may or may not be known by others in the chain of evaluation. (H.T. 84-85). Even physicians who have equal access to information often reach different conclusions about causes of injuries. (H.T., p. 86).

Over the past ten years, Dr. Kennetz has reported to child abuse authorities ten to fifteen cases of bruising *when* it was accompanied by other injuries such as fractures or lacerations. (H.T., p. 87-88). Only a fraction of a per cent was reported when bruising was the sole indicator of abuse. (H.T., p. 89). Similarly, Dr. Kennetz disputed as "too high" the state's assertion that 30 per cent of children seeking treatment in emergency rooms are victims of abuse. (H.T., p. 89-90). He also knew of no other physician who had experienced such high rates of child abuse in emergency room care. (H.T., p. 90).

Correspondingly, Barbara Schaffitzel, a former director of nursing for Cox Medical Center in Springfield, Mo. (H.T., p. 93-94), acknowledged that many times there was disagreement among the nursing staff as well as others as to the meaning of the phrase "reason to suspect." (H.T., p. 96-97). Often, the determination of child abuse depended on a variety of circumstances including the consistency of an explanation of injury. (H.T., p. 100). An explanation for

bruising offered by a foster parent, as compared to others, generally would be given more credence. (H.T., p. 101). The extent of the inquiry also might be affected by the seriousness of other injuries, the consistency of several witnesses or by other factors such as the time available for questioning. (H.T., p. 99-102). Minor aspects of a child's injuries such as "fingertip bruises" might be overlooked if there were a focus on other medical concerns. (H.T., p. 104). The unique circumstances surrounding each examination also could play a role in a nurse's assessment and is hard to duplicate from case to case. (H.T., p. 104-106). The amount of time spent with a child and confirmation or discrediting of injuries through other diagnostic methods also might be important in making a judgment about "reasonable cause to suspect" child abuse. (H.T., p. 104-106).

Moreover, there is an inherent tension among reporters in the interpretation of the Missouri's child abuse reporting law. The imprecision of language leaves those subject to the law without warning and at the mercy of arbitrary judgments by police, prosecutors and judges.

Seen another way, Missouri's effort to detect and eliminate child abuse is thwarted by requirements that do away with the exercise of discretion by health care professionals. Here, the state's position is that Leslie Brown should be criminally liable for exercising her discretion. Forget that she did not act willfully or knowingly or that her conduct was not a gross deviation of accepted standards

or that health care workers in the future should ignore the importance of trust between physician or nurse and patient. Instead, hold the statute constitutional and send a message to all parents that they should anticipate being investigated by the state when they seek treatment for their injured children.

The state may counter that that is not what was intended but if you examine § 210.115.1 there is no guidance or warning. The only certain standard remaining is that policemen, state social workers, prosecutors and judges are the arbiters of what is criminal and what is not. A statute or a scheme of statutes in this condition is void for vagueness.

Finally, consider the effect if the child abuse reporting statute is held unconstitutional. By some accounts, this case is the only one that has ever been pursued under §§ 210.110 to 210.165. This may be due to the uncertainty of the statute and because prosecutors have overlooked the import of the language. If held unconstitutional for vagueness, the revision necessary to meet specificity requirements could be met easily by legislative amendment. Because § 210.120 requires radiologic confirmation at the expense of the state if medically indicated, a great deal of expense could be avoided by simple, corrective legislative action. Following revision, there also would be less incentive for parents to withhold seeking medical treatment out of fear of investigation and doctors and hospitals would not have to contend with burdensome and expensive procedures that

inevitably would drive up health care costs. Moreover, there is a choice between two interpretational paths regarding Missouri's child abuse reporting laws. The Court may determine they are in need of precision and clarity and send them back to the legislature for revision, or they can be applied to necessitate the reporting of every injury to a child, regardless of the source.

From respondent's perspective, there is much to be gained in clarity and efficiency by rejecting these poorly written and conceived statutes.

## Conclusion

For all of the foregoing reasons, respondent invites the Court to affirm the trial court's judgment declaring §§ 210.115 and 210.120 RSMo void for vagueness as violating the Due Process clause contained the United States and Missouri constitutions.


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## Certificate of Service

I certify that two copies of appellant's brief on appeal were mailed to Ms. Cynthia A. Rushefsky, Assistant Prosecuting Attorney, 1010 Boonville, Springfield, MO 65802 and Ms. Cheryl Caponegro Nield, Assistant Attorney General, P.O. Box 899, Jefferson City, MO 65102-0899 on this ___ day of April, 2004 and further that the brief contains 5,625 words, 572 lines and complies with Rule 84.06(b) of the Missouri Rules of Civil Procedure. I also certify that a copy of the disk was furnished to the Court and counsel for respondent on a double-sided, high intensity, IBM-PC-compatible 1.44 MB, 3½-inch size floppy disk and that the disk has been scanned and is virus free.

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Thomas D. Carver

# Appendix